



September 17, 1999

Mr. Steven S. Poston
Hayes, Coffey & Berry
1710 Westminster
Denton, Texas 76206

OR99-2601

Dear Mr. Poston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 127370.

The Town of Hickory Creek (the "town"), which you represent, received a written request for "[a]ll information pertaining to the proposed Blue Sky development and golf course." Both you and the attorney representing Blue Sky contend that the requested information is excepted from required public disclosure pursuant to section 552.110 of the Government Code in conjunction with *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Section 552.110 of the Government Code excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. This office further recognized in Open Records Decision No. 639 that the test for withholding commercial or financial information that is *voluntarily* submitted to a governmental body may be withheld from the public under the second prong of section 552.110 if the information meets the test established under *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Under the *Critical Mass* test, commercial information is excepted from required public disclosure if the information

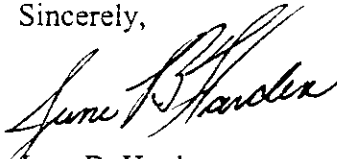
is voluntarily submitted to the government and the information is of a kind that the provider would not customarily make available to the public. *Critical Mass*, 975 F.2d at 872.

However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). Because *Critical Mass* merely interprets one aspect of the court's holding in *National Parks*, we conclude that *Critical Mass* is also not a judicial decision within the meaning of section 552.110. Neither the town nor Blue Sky has cited to a statute or judicial decision that makes the information privileged or confidential. Consequently, the town may not withhold any of the information submitted by Blue Sky under the commercial or financial information prong of section 552.110.

The request for information also encompasses information pertaining to Tour 3 Golf Center ("Tour 3"). This office notified representatives of Tour 3 of the request for records concerning their company and invited comments as to why those records should not be released to the public. Tour 3 has not responded to our notice. This office, therefore, has no basis on which to conclude that the Tour 3 records are excepted from public disclosure. Consequently, the town must also release those records to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/RWP/nc

Ref: ID# 127370

Encl. Submitted documents

cc: Mr. Terry Dyson
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